SAMUEL HAZARD'S ADMINISTRATOR, PLAINTIFF IN ERROR v. THE NEW ENGLAND MARINE INSURANCE COMPANY.

Insurance was effected in Boston, Massachusetts, on the ship Dawn, from New York to the Pacific ocean, on a whaling voyage, and until her return. The letter ordering insurance was written in New York, by the owner of the ship, who resided there; and the ship was represented to be a "coppered ship." The ship, on the outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands; where she arrived in a leaky condition, and upon examination by competent surveyors she was found to be so entirely perforated by worms in her keel, stem and stern post, and some of her planks, as to be wholly innavigable: and being incapable of repair at that place, she was condemned and sold. The vessel, on her outward voyage, had put into St Salvador, and both at the Cape de Verds, and at St Salvador, her bottom was examined by swimmers. It was in evidence, that the terms "a coppered ship," had a different meaning, and were differently understood in Boston and in New York. Held, that the assured, in making the representation in the letter, was bound by the usage and meaning of the terms contained therein, in New York, where the letter was written and his ship was moored, and not by those of Boston, where the insurance was effected.

Insurance. A representation to obtain an insurance, whether it be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty; as that always makes a part of the policy, and must be strictly and literally performed.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political condition of foreign nations. Men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries. This knowledge is essentially connected with their ordinary business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests.

It is upon the representation that the underwriters are enabled to calculate the risk, and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided. It is therefore immaterial in what way the loss may arise, where there has been such a misrepresentation as to avoid the policy.

The judge of the circuit court, on the trial of the case, charged the jury, that "if they should find that in the Pacific ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." By the court: In the form in which this instruction was given, there was no error.

[Hazard's Administrator v. New England Mar. Ins. Company.]

The circuit court instructed the jury, "that if there was no misrepresentation in regard to the ship, and she substantially corresponded with the representation, still if the injury which occurred to the vessel at the Cape de Verds were reparable, and could have been repaired there, or at St Salvador, or at any other port at which the vessel stopped in the course of the voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss. And if he omitted to make such repairs, because he did not deem them necessary; and if by such neglect alone the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss." By the court: If the loss by worms is not within the policy, as has been decided, the court did not err in giving this instruction. The negligence or vigilance of the master would be of no importance under the circumstances, in regard to the liability of the underwriters.

IN error to the circuit court of the United States for the Massachusetts district.

In the circuit court, an action of assumpsit was instituted by the plaintiff in error, as the administrator of Thomas Hazard, deceased, on a policy of insurance, dated 26th December 1827, whereby the defendants caused to be assured Josiah Bradlee & Co., for Thomas Hazard, Jun., of New York, fifteen thousand dollars on the ship Dawn, and outfits at and from New York to the Pacific ocean and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States, with liberty, &c.

The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo, and also a partial damage to the vessel by perils of the seas.

It appeared in evidence, that the vessel sailed on the 29th of December 1827; and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a portion of her false keel, but proceeded on her voyage, and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December 1829, in a very leaky condition; and upon an examination by competent surveyors, she was found to be so entirely perforated by worms in her keel, stem and stern post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold.

It also appeared in evidence, that after the vessel sustained

the injury at the Cape de Verds, she put into St Salvador; and that both at the Cape de Verds, and at St Salvador, the bottom of the ship was examined by swimmers.

The defence to the action was rested on the following grounds.

1. That there was a misrepresentation of a fact material to the risk, in the application made for the insurance, which was by letter, and in which the vessel was represented to be a coppered ship. It being alleged by the defendants, that by the terms "coppered ship," applied to a vessel destined upon a whaling voyage in the Pacific ocean, it would be understood, according to the usages of insurance in Boston, that the sides and bottom of her keel were covered with copper; and they adduced evidence to prove this position, and also that the keel of this vessel was not so covered.

And upon this point the plaintiff produced evidence to prove that the keel was so covered, or if not, that it was nevertheless covered with leather, and which was alleged to afford an equally permanent and effectual protection against worms.

The letter referred to was as follows:

New York, Twelfth month 22, 1827.

Josiah Bradlee & Co., Boston.

Respected Friends:—My ship, the Dawn, of New York, Henry Gardiner master, is now nearly ready for sea, and will probably sail in the course of next week on a whaling voyage to the Pacific ocean and elsewhere. I wish you to have twenty-five thousand dollars insured for my account, on the ship and outfit, the ship valued at fifteen thousand dollars, and the outfit valued at ten thousand dollars, each subject to its own average—the outfit to be transferred to my share of the oil, which will be about two-thirds of the oil, as fast as it shall be obtained; the oil valued at sixty cents a gallon. If any part of the oil should be sent home by any other vessel or vessels, that part of the oil not to be deducted from the sum insured on the outfit. Our ships sometimes take oil on their outward passage, and wish to send it home; therefore you will please to have it stipulated in the policy for liberty to do it, and also for liberty to stop from time to time to procure refreshments, as is usual and customary on such voyages. This is the same ship that you had insured for me in Boston some years since. I will only

observe, that I believe her to be one of the strongest and best ships in the whole fishery: she has been newly coppered to light water mark, above which she is sheathed with leather to the wales, and fitted in every respect in the best manner, and commanded by an experienced, capable and prudent master, which entitles her to be insured at as low a premium as any ship in that business. You got her insured for me the last time, on a similar voyage, against all risks, for six per cent, although I understand that premiums have risen a little in Boston. I can but hope that you will be able to get this assurance effected at six and a half or seven per cent—indeed I should not be willing to give more than eight per cent. Hoping to hear from you soon on the subject of this insurance, I remain, with great respect, your assured friend,

THOMAS HAZARD, JUN.

The plaintiff also gave in evidence a letter from his intestate, of which the following is a copy.

New York, Eighth month 20, 1824.

JOSIAH BRADLEE & Co.

Esteemed Friend:—My ship, the Dawn, of New York, John H. Butler master, sailed yesterday morning on a whaling voyage to the Pacific ocean and elsewhere. I wish you to have twenty-five thousand dollars insured, provided you can get it effected at seven per cent or under. This ship is about three hundred and twenty-seven tons, built in this city, of excellent materials; is between seven and eight years old, copper fastened, newly sheathed with wood, which was put on with composition nails, and then sheathed over the wooden sheathing with sole leather, which was also put on with composition nails. Ship valued at fifteen thousand dollars, and the outfit at ten thousand dollars, each subject to its own average; the latter to be transferred to the oil as fast as it may be obtained (say my proportion, which will be about two-thirds of all that may be obtained), the same to be valued at forty cents per gallon; if part should be sent home by any other vessel or vessels, that part not to be deducted from the amount insured on the outfit. Sometimes our ships take oil between here and the Cape de Verd Islands, and wish to send it home; therefore I wish you to stipulate in the policy for liberty to do it. Hop-

ing to hear from you soon on the subject of this letter, I remain, your assured and very respectful friend,

THOMAS HAZARD, JUN.

P. S. It must be stipulated in the policy that the ship have liberty to stop for refreshments, as is usual and customary on such voyages.

The evidence was submitted to the jury under the following charge, by the presiding judge of the circuit court.

That, as to the objection taken to the plaintiff's right of recovery, upon the ground, that there was no sufficient abandonment made out, whatever might be his opinion of the validity of the objection, he should, for the purposes of the trial, rule, and he accordingly did rule, that under all the circumstances of the case, the abandonment was sufficient in point of law. 2. That the representation and facts stated in that letter (the letter of the plaintiff's intestate to his agents, left with the defendants at the time application was made for insurance), so far as they were material to the risk, must be substantially true: that if the ship was not coppered, as stated in that letter; and the ship did not, in that respect, correspond with the representation, and the difference between the facts and the representation was material to the risk, then the plaintiff was not entitled to recover upon the policy: and he left the facts as to representation and the materiality, to the jury. That, in ascertaining whether the vessel was coppered, it was for the jury to determine what constitutes a "coppered ship;" and if the jury should find from the testimony, that in order to constitute what is called a coppered ship, the bottom of the keel, and the sides of the keel, as well as the sides of the vessel, must be coppered; and they should further find that this vessel was not so coppered, and the deficiency was material to the risk: then there was not a compliance with the terms of the letter left with the underwriters, and the underwriters were not liable upon the policy. Or, if they should find that a ship coppered on her sides, and also on the sides of the keel, and not on the bottom of the keel or false keel, would meet the representation of a coppered ship on other voyages, but that in whaling voyages in the Pacific ocean, the usual and customary mode is to copper the bottom of the keel or false keel; and it is understood by underwriters, when application is made for insur-

ance on such voyages, that vessels are so coppered, unless the contrary is stated; then, inasmuch as the letter applying for insurance is an application for insurance of a vessel on a whaling voyage in the Pacific ocean, the underwriters had a right to consider the representation in the letter as describing the vessel as coppered, in the manner in which vessels are usually coppered for such voyages: and if the ship was not so coppered, and that deficiency was material to the risk, the terms of the letter were not complied with, and the defendants were not bound by the policy.

1st. The court further charged, that in ascertaining what is to be understood as a coppered ship in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms in the place where the insurance is asked for and made; unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes asking for the insurance; or unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from that which prevail in the place where the insurance is asked for and made.

2d. The court further charged the jury, that although the terms of the letter applying for insurance were not to be considered a technical warranty, yet, if the coppering of the ship as stated in the letter on which the insurance was made, was substantially untrue and incorrect in a point material to the risk; such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering.

3d. The court further charged the jury, that if there was no misrepresentation in regard to the ship, and she substantially corresponded with the representation; still, if the injury which occurred at the Cape de Verds was reparable, and could have been repaired there or at St Salvador, or at any other port at which the vessel stopped in the course of the voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss. And if he omitted to make such repairs, because he did not deem them necessary; and if, by such neglect alone, the subsequent loss of the ship by worms

was occasioned, the underwriters are not liable for any such loss so occasioned.

4th. The court further charged, that if the jury should find, that in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy.

5th. The court further charged, that as the decisions of the courts in Massachusetts had established that damage arising from injury by worms was not a loss within the policy; the underwriters in Boston must be deemed as contracting in reference to those decisions, and not liable for losses from that cause.

The court further charged the jury, that if in consequence of the injury sustained at Port au Praya, in the Cape de Verds, the false keel was torn off, whereby the vessel became exposed to the action of the worms, and that they thereby obtained entrance and destroyed the vessel, that the loss would not come within the policy; it being a consequential injury, against which underwriters are not considered as taking the risk.

The counsel for the plaintiff called upon the court to charge upon the two following points: That if the jury believed that the underwriters would not have charged a higher rate or premium if the vessel had been correctly represented than they did charge, and that the insured had not intentionally misrepresented the facts; then the representation contained in the letter is not material, and does not defeat the policy. Second, if they believed that the object of coppering the bottom of the keel is to protect it against worms, and if they also believed the leather an equal protection, and was put on; in that case the letter would not be considered a material misrepresentation.

1. The court refused to direct the jury in the terms stated: but upon this point did direct the jury, that if the fact was not material to the risk, and would not have varied the conduct of the underwriters, either as to the premium of insurance, or as to the underwriting at all, if the fact had been correctly represented, and the insured had not intentionally misrepresented the facts; then the misrepresentation will not prevent the insured from a recovery in this case, or defeat the policy.

2. The court refused to give the directions in the terms stated; but upon this point directed the jury, that if the object of coppering the bottom of the keel was to protect it against

worms, and if they believed that leather is an equal protection, still if the fact was, that the letter of instructions did contain a representation which was, and must have been understood, as representing that the keel was coppered; and if that fact was material to the risk, and might have induced the underwriters to ask a higher premium, or not to have underwritten at all; then the misrepresentation of its being copper, when it was leather, would avoid the policy. But if it was not a fact material to the risk, and would not have changed the conduct of the underwriters, either as to underwriting at all, or in asking a higher premium; then the misrepresentation would not avoid the policy.

The counsel for the plaintiff excepted to the charge of the court, on the points above stated; and the jury having rendered a verdict in favour of the defendants, the court entered judgment thereon; and the plaintiff prosecuted this writ of error.

The case was argued by Mr Selden, for the plaintiff in error; and by Mr Loring, with whom was Mr Webster, for the defendants.

Mr Selden, for the plaintiff in error, contended, that the charge of the court was erroneous on all the points operating against the claim on the underwriters.

Upon the evidence in the case he argued, that it was by no means clear that "a coppered vessel," in the interpretation given to the terms by the underwriters in Boston, required that the coppering should extend over the false keel. The testimony upon this point, in reference to vessels engaged in the trade of the Pacific ocean, and sailing from Boston, was contradictory; while it was fully shown by the evidence of witnesses examined in New York, that "a coppered ship" was not required to be coppered in any other manner than that in which the Dawn was coppered.

The charge of the court is erroneous where it adopts the rule to be, that the interpretation of the letter requesting insurance is to be such as the terms used in it are understood at the place where insurance is made. The letter for insurance was in this case written in New York, and it is to be understood as it would be in New York. The court excluded the inquiry

as to the meaning of "a coppered ship" in the port of New York.

Underwriters are presumed to know the usages and customs of all the places from or to which they make insurances. In this case the representation, according to the custom and usage in the port of New York, was faithfully correct.

Nor could any charge of concealment be made, as the letter of the owner of the Dawn was put into the possession of the underwriters; and that letter describes the ship to be what in point of fact she was. There is not a pretence of intentional misrepresentation. Upon these principles were cited, Hughes on Insurance 366, 351; 5 Barn. and Ald. 238; 4 Wendall 76; 1 Peters's C. C. R. 160; 1 Wash. C. C. R. 219; 1 Binn. 341.

2. It is not contended that if it had been known to the assured that the interpretation of the words describing the ship as a coppered ship, was different in Boston from that which prevailed in New York, the difference should not have been admitted; and the description of the vessel should have stated with more precision the manner in which she was coppered. But no such information was in the possession of the assured; and he, as well as his agents, acted in perfect good faith. Upon the charge of misrepresentation in the description, the counsel contended, that it should have been shown on the part of the underwriters, as there was no allegation of mala fides, that the facts said to have been misrepresented, materially contributed to effect the loss.

The proposition laid down in the charge of the court is too broad. The rules of law relative to contracts of insurance, do not differ so widely from the rules relative to ordinary contracts. Those rules in reference to other contracts are, that all that passed before the contracts shall not be considered. Unless when fraud is charged, a party cannot go back to the state of things before the contract was made. Recently, the disposition of courts has been to assimilate the principles of law operating on contracts of insurance to the law of other contracts.

The rule claimed for the plaintiff in error applies in all the class of cases where the party has acted under a want of knowledge, and without any fraud. This is now the established principle. The court will always say, that in all cases the

injury must have been the consequence of the very fact represented. But by the rule laid down in the charge of the court in this case, from its generality and breadth, the underwriter would be discharged in case of any deficiency of outfit, although afterwards supplied. Cited, 1 Moody and Neale's Rep. 367; 22 Common Law Rep. 337; Hughes on Insurance 348; Douglas's Rep. 238; 8 Wendall's Rep. 163.

3. The master of the ship should have made the repairs required in consequence of the accident to the ship; and if he did not make them, the underwriters are not discharged in consequence of his neglect to have the repairs made.

It is contended that after the injury happened, the master became the agent of the underwriters, as well as of the assured, for the purpose of making the necessary repairs. This was most certainly the case in the present controversy, as the judgment of the master was exercised upon the subject of the repairs, and as they might have been considerable. The master thought the interests of the assurers were promoted by the course he pursued; but the charge of the court denies the right of the master to exercise his discretion, and denies to the plaintiff the benefit of this principle of the law of insurance. From the period of the accident this agency existed; and the assured is not to be subjected to the consequences of its not having been properly used. This rule does not extend to the cases in which the technical rules relative to abandonments prevail. The authorities show that the contract of the owner is fulfilled when he provides a competent master; and sustain the principle that, under such circumstances as those of the case before the court, the master is the agent of all the parties to the contract of insurance. Cited, 2 Barn. and Ald. 82; Phillips on Ins. 249; 7 Barn. and Creswell 794; 5 Barn. and Ald. 171.

4. As to the point whether a loss caused by the destruction of the vessel by worms is within the policy, it was argued, that but one case, other than that decided in Massachusetts, sustained the principle claimed for the underwriters in this case; that was the case in 1 Espin. Rep. 444. The vessel was engaged in the slave trade, and the destruction was produced by her lying in the rivers in Africa. Her death wound was received during that time. But in this case the injury from

worms took place while the ship was on the high seas, in the regular prosecution of the voyage insured. The loss was the consequence of her navigating the Pacific ocean. The destruction was not from the age of the vessel, but by a cause which operates on new as well as old ships.

The authorities upon the law of insurance do not sustain the position laid down by the circuit court in the charge to the jury. The case of Martin v. The Salem Insurance Company, 2 Mass. Rep. 424, is imperfect; and does not establish the general principle. It rests upon the case in Espinasse, cited; and the injury occurred while the vessel was at the wharf, detained by the embargo. The loss by worms has been likened to one sustained by rats, but the cases are dissimilar. In reference to the liability of underwriters for such losses, the cases are contradictory. Cited, 1 Binn. 592; 4 Camp. 203.

Abbott on Shipping does not class this among the losses for which the assurers are not liable. Abbott 257. In 2 Caines 85, Judge Livingston disapproves of the decision in Rohl v. Parr, 1 Esp. 444.

Mr Loring, for the defendant.

The first question presented for the consideration of the court, is one involving the principles of verbal construction. The defendants maintain, that the ruling of the court was correct; that the terms "coppered ship," are to be understood according to the usage and sense prevailing in the place where the insurance was asked for, and the contract was made, and to be performed.

The fundamental principle of verbal construction is, that words are to be understood in that sense in which the party using them supposes that the party to whom they are addressed receives them.

The position laid down by the court, seems a necessary corollary of this general proposition; for the party using terms to another, in a place in which he knows that a distinct meaning obtains, must presume that to him such will be their only import. If he knows that they admit two or more senses, he either knows that the party to whom they are addressed will construe them in one rather than in the other, or is bound to explain the meaning; and if he is ignorant of any meaning dif-

fering from that in which he understands them, he should abide the consequences, if the other party, honestly and without fault is misled; for the writer is the author of the mistake, however inadvertently. And in this particular, the case might be likened to that of an inadvertent trespass, in which the party occasioning the damage is bound to make indemnity, however unintentional may have been the act.

In the case at bar, if the plaintiff's testator honestly used the words in one sense, and the defendants as honestly understood them in another, there was a mutual mistake, and therefore no contract between them: and the case is analogous, if not similar to that of an inadvertent and innocent misrepresentation, or concealment of a fact material to the risk; in which, according to the established principles regulating the contract of insurance, the policy is held void. Numerous cases have been decided, illustrative of the application of this principle. Thus, if a bill of exchange for a given number of pounds be drawn in London or Dublin or Bermuda, and the currency be not specified, it will be payable in Irish or Bermudian currency, and not in pounds sterling. So in cases of contracts made between parties resident in different countries, in which a difference of weight or measure prevails, they must be construed according to the import of the terms in that country where the contract is to be performed; although the party residing in the other may have been ignorant of such difference. Potter v. Brown, 5 East 130; Bridge v. Wain, 1 Stark. Rep. 504; Kearney v. King, 2 Barn. and Ald.; Benson v. Schneider, 7 Taunt. 272; Burrows v. Jenins, 2 Strange 733.

In reply to the position taken by the plaintiff's counsel, that the rule laid down by the court is not applicable, because the terms in question were not used in the policy, but in a collateral paper; it is submitted, that the paper referred to, being the written representation upon which the insurance was applied for, was the basis of the whole contract, and can with no more propriety be termed collateral, than would be the foundation of a building in reference to the superstructure.

It is said, that because the letter was written in New York, it is to be understood as the terms are there used. But if it was written, it was not to be read, nor understood, nor acted upon there, but in Boston. If the plaintiff's testator, instead

of writing, had applied personally, and used the language in the city of Boston, it is believed that the rule laid down by the court would be esteemed correct; and it is not perceived that there is any substantial difference between the two cases.

It is asked by the plaintiff's counsel, what would have been the consequence if the question before the court had come up in the form of one of seaworthiness instead of one of construction, and it had been proved that this vessel was seaworthy for the voyage, according to the understanding of merchants in New York, though not so considered in Boston? The answer is obvious. Admitting, that in such case the insurers would be liable, because by underwriting a New York ship they must be presumed to have known, or been willing to take the risk of such preparation as is usual in that port; still, such a view does not cover the case at bar. For here the question is one of representation concerning a particular fact affecting the seaworthiness of the vessel, which the insured was not bound to make, but which, if made, must be strictly true. And if it prove otherwise, and be of a fact affecting the risk, the policy is void, although the vessel might have been seaworthy.

If there is a material difference between a leathered and a coppered keel, and the insured represented it to be coppered, when in fact it was covered with leather; it is not the less a misrepresentation, though both be seaworthy. So that the question rests wholly upon the inquiry as to what is the proper construction of the particular terms used, without reference to the question of seaworthiness.

Again, it was urged, that insurers are bound to know the usages of trade, and of course to know the meaning of the terms used in trade. It is conceded that they are bound to know the usages of trade affecting the risks which they assume; and it may also be admitted, that they are bound to know the ordinary meaning of the terms used in their contracts; but they are only bound to know them as used in those places where the contract *is made, and to be performed.* If, in this case, at the time when the letter was written, there had been a difference in the currency between New York and Massachusetts, so that a dollar in the former was worth ninety cents only, while in the latter worth an hundred, the plaintiff's tes-

tator would not have been content to have the terms used in the proposal, construed according to their meaning in New York.

The second objection taken by the plaintiff, is to the rule laid down by the court, that the misrepresentation of a fact material to the risk, defeats the policy, although the subject of such misrepresentation may not have contributed to the loss. This rule of law has been so long established, and has been so universally recognized, that it is more properly to be considered as an axiom or postulate in the law of insurance, than a subject for argument.

The comments of the plaintiff's counsel upon the evidence to this point, are believed to be irrelevant; for the fact of the misrepresentation of a circumstance material to the risk being established, we are stopped in limine, we cannot go farther to argue what effect the want of copper upon the keel might or might not have had upon the interest, or rights, or obligations of the parties; for there are no rights, nor obligations, nor parties; there was no contract. That this rule has been universally recognized, appears by all the elementary writers. 1 Marsh. on Ins. 453—456; Hughes 345; Phillips 80—111; 3 Kent's Comm. 230; Lynch v. Hamilton, 3 Term Rep.; Lynch v. Dunsfort, 14 East 394.

But the plaintiff relies upon the case of Kinn v. Tobin, 1 Moo. and Mal. 367, as establishing a different rule; yet upon examination, and a strict application of the language of the court to the facts then under consideration, it will not be found to authorize any such inference. The point upon which it appears to have been decided was, that the alleged misrepresentation was in fact a different executory agreement, which could not be proved to vary the written contract; but if fraudulently made, for the purpose of inducing the insurer to subscribe the policy, might be proved to vacate it.

The next point arises upon the refusal of the court to charge the jury, that if they believe that the object of coppering the bottom is to protect it against worms, and if the leather were an equal protection, the letter applying for insurance would not be considered a material misrepresentation. The refusal of the court seems however obviously correct; because the direction prayed for, if given, would have prevented the jury

from inquiring into the other effects of covering a vessel's bottom with leather instead of copper, beside that of protection against worms; and which other effects might be material to the risk and vary the premium, although vessels might not be coppered on account of them only; as for instance, the well known tendency of leather to become foul and covered with shell fish and grass, &c., by means of which her sailing is materially affected, and her chance of escaping from capture and other perils diminished, and her voyage prolonged, thus increasing the duration of the risks insured against. And although these reasons might not apply in their full extent to the case at bar, the principle is nevertheless the same; and it may also be added, that there would be a material difference in a keel newly coppered, as this was represented to have been, and one covered with leather three years old, as this was proved to have been; and that insurers are not bound to run the hazard of experiments made contrary to their contract, and without their knowledge.

The next exception taken by the plaintiff was to the instruction, that if the jury should find that in the Pacific ocean worms ordinarily assail the bottoms of vessels, a loss from such a cause would not be within the policy; and that as the decision of the courts in Massachusetts had established this doctrine, the underwriters of this policy must be deemed as contracting in reference to them, and so not liable for such a loss.

The first part of this proposition seems manifestly correct. If worms infest the Pacific ocean, so that a vessel upon entering it, and not properly protected, is necessarily exposed to destruction, the danger is not an extraordinary peril, against which alone insurance is made; but a certain one, against which the insured is bound to provide.

A contrary doctrine would involve the absurdity of converting the contract of insurance into one of indemnity against certain loss.

This point has been long established and acquiesced in by insurers and elementary writers, without question of its soundness. 1 Esp. Cas. 144; 2 Marsh. 492; Benecke 456; Hughes 218; 3 Kent's Comm. 248.

The suggestion in Phillips 251, is unsupported by authority;

and however just such a rule might have been in former times, it cannot be so considered, now that repairs of vessels can be made in all parts of the world. And the application of the lex loci is indisputable.

A further exception is to the charge, that if the injury to the copper might have been repaired, and the subsequent loss by worms happened by reason of the master's neglect to make such repairs, the insurers are not liable.

The general proposition, that the assured is bound to keep his vessel in a suitable condition to perform her voyage, it is believed, has never before been questioned. This obligation upon him as owner, in all cases of charter parties and contracts of affreightment, is perfect; and, it should seem, ought to be so with regard to insurers. 1 Abbot on Shipping 218, note (ed. 1829); Putnam v. Wood, 3 Mass. 481.

It is true, that the original doctrine of implied warranty of seaworthiness has been somewhat mitigated by late decisions; it having been recently held that an excess or deficiency in the condition of the vessel, removed before a loss, restores the contract. 1 M. and R. 673; 7 B. and C. 794. But no change has been made affecting the implied contract which the insured is under to do his duty, by keeping his vessel in suitable repair.

The plaintiff rests this part of his case upon these two positions. 1. That the implied warranty of seaworthiness applies only to the commencement of the voyage, and is not continuous. 2. That the master, after a disaster, becomes the agent of the insurers as well as of the insured; and therefore the insurers are liable for the consequences of his neglect or mistake in omitting to repair the damage done by such disaster.

The first position is at least of doubtful authority, and however maintainable upon the strength of English decisions, the American cases seem to establish a contrary doctrine. It rests upon the authority of the cases above cited. 1 M. and R. 673; 7 B. and C. 794.

It seems opposed to those general principles heretofore supposed the basis of this contract. Good faith to the assurer, assuming great hazard for small compensation, having no possession or right of possession of the vessel, nor any knowledge

of her condition, nor any power to keep her seaworthy, and relying therefore entirely upon the skill, care and fidelity of the owner and his agents; requires that they be held strictly to the obligation of such skill, care and fidelity, as a condition precedent to any rights under this contract. And public policy, interested in the preservation of vast amounts of property and of human life, wholly dependent upon the fidelity with which this part of the duty is performed by the insured, equally demands his being holden to this strict obligation, in order to visit upon him, in case of a breach of it, the whole loss, as a just retribution for his carelessness or neglect.

The American cases referred to are, Tidmarsh v. The Washington Fire and Mar. Ins. Company, 4 Mason 439; Peters et al. v. The Phœnix Ins. Company, 3 Serg. and Rawle 25.

But if this position were sound, it would not avail the plaintiff; for it would not prove that the insurers are liable for a loss happening even by a peril insured against, if the direct consequence of unseaworthiness. And still less would it prove, that they are liable for a loss by a peril *not insured against*, arising from that unseaworthiness, which is the case at bar.

The cases relied on by the plaintiff, tend to establish merely this doctrine, that the implied warranty of seaworthiness relates only to the commencement of the voyage, so that if complied with, the contract still subsists, though there be subsequent unseaworthiness, which might have been repaired. They do not sustain the doctrine, that if a loss happened from such unseaworthiness, the insurers will be liable for that loss, however they might be for one arising from any other cause.

These two propositions are entirely distinct. An implied warranty is in the nature of a condition precedent to the inception of the contract, without the performance of which it never takes effect. The duty of keeping the vessel in a seaworthy state is a continuing obligation, *consequent* upon the contract; the breach of which will not destroy it, though it will visit upon the insured the consequences of such breach.

The doctrine, that insurers may be holden answerable for losses occasioned by unseaworthiness, which might have been repaired, is at variance with principles of public policy, the received opinions of insurers, and the reasonable construction of the language of their contract. It would open a wide door to

frauds, by tempting the insured to convert small into great, and partial into constructive losses.

If, for instance, a partial damage should not amount to the stipulated average of five per cent on the value of the vessel, which is necessary to create liability on the part of the insurer; how easily might it be made one, if left unrepaired until sufficiently increased or connected with others. And if a partial loss, one-third of the expense of repairing, which must fall upon the insured, should be worse for him than a constructive total loss, as very frequently happens, what would be more easy than to suffer it to become one? And how readily the insured and their agents yield to temptations of these descriptions, judicial records furnish plenary evidence.

If a party may insure against loss by a breach of his own contract, occasioned by the neglect or default of his agent appointed to fulfil it; what limit is there to the temptation to fraud and the exposure of property and life, short of the negligence and avarice of those who may be entrusted with their preservation?

That this doctrine is opposed to received opinions, is manifest from the consideration that no decided case, no judicial obiter dictum, no opinion of an elementary writer, is adduced in support of the plaintiff's position. The doctrine contended for, if established, would seem to constitute one, if not the only exception to the elementary rule, that no man shall take advantage of his own wrong.

Again, this doctrine is opposed to the reasonable construction of the *language* of the contract. The insurers undertake to indemnify against *losses* by perils of the sea. What then is such loss in any given case? It is clearly the extent of damage then sustained, to be estimated by the cost of repairing it at the time and place when and where such reparation can, by reasonable diligence, be first had. The loss is then ascertained and determined. The peril and its *legitimate* consequences have then ceased. The insured cannot, by his own act or neglect, add to such loss, or superinduce further consequences at the expense of the underwriters.

If the vessel be further exposed, and lost, by reason of the damage which could have been so repaired, such further loss is not a legitimate consequence of that peril, because neither

inevitable nor reasonable. And, if a vessel so circumstanced be lost, with or without the occurrence of a new peril, which would not have proved fatal to her but for the omission to repair the damage, the subsequent loss is not one by a peril insured against. Thus, if a vessel be strained, and arrive at a port where repairs can be made, the expense of such repairs is the amount of the loss. The peril and its legitimate consequences have terminated. If she sail without repairs, and founder in smooth weather, the foundering is not by a peril insured against, for there was none at the time. So, if she founder in a gale of wind, which it could be proved that she would have weathered had she been properly repaired, the result would be the same. In neither of these cases is the total loss the necessary or fair consequence of the peril insured against, but is owing wholly to the neglect of the assured or his agents.

In such a case, however, the *partial* loss is by a peril insured against, and to that extent the underwriters are liable: but the subsequent total loss was not so; for it was not immediately owing to any peril, nor necessarily consequent upon any.

The case would be otherwise, if the damage were such as could not by reasonable care have been discovered, or by reasonable diligence been previously repaired; for then all the consequences of the original peril would be properly considered as immediate or necessary.

Thus, in the case at bar, the loss of the false keel at the Cape de Verds, and of the copper (if she was coppered), was a partial loss, which might have been immediately or soon after repaired; and for the expense of which reparation the defendants were accountable, cost what it might. The subsequent loss by worms, therefore, was neither an immediate nor inevitable consequence of the peril there encountered.

If the plaintiff's doctrine be sound, then, as it took two years after the happening of the peril for the worms to complete the destruction of the vessel, she is to be considered as having been kept, for that time, under the perpetual and incessant operation of the consequences of the peril, by the mere will or neglect of the insured, at the hazard of the underwriters.

If the master, by his omission to make repairs while in port, may render the insurers liable for a subsequent loss at sea, happening by reason of their omission; why would they not

be answerable for the loss, should he abandon the ship in port, instead of repairing her? The consequences would be far less serious to the underwriters.

The case of a loss, happening in consequence of the previous neglect or default of the assured to repair his vessel, is plainly distinguishable from the case cited by the plaintiff, in which it has been decided that underwriters are answerable for losses immediately owing to perils insured against; though the exposure to such perils be occasioned by the accidental negligence of the master or crew. From the imperfection of human nature, it must be anticipated that the perils insured against will thus sometimes occur, and it is not unreasonable therefore to consider them as comprehended in the contract; whereas a neglect or voluntary omission to make necessary repairs is not accidental, nor to be anticipated, but is like any other omission to fulfil a contract, the consequences of which must fall upon the guilty party.

Thus, if the insured were himself on board the vessel, he could not prevent her loss by the former cause, i. e. some sudden or accidental carelessness, but he could keep his vessel in good repair; and the master in this respect is his representative. Paddock v. Franklin Ins. Co., 11 Pick. 227; 3 Serg. and Rawle 25.

But if the plaintiff's position were tenable, and insurers were answerable for losses happening by means of perils insured against, though occasioned by the previous neglect or default of the insured to keep the vessel in a seaworthy condition, such a doctrine would not embrace the case at bar: for here the vessel was not lost by any such peril, but by worms, which is not a peril embraced in this policy.

It surely will not be pretended that underwriters are liable for the negligence or default of the master, as such, where no peril insured against was in operation: and neither can they be liable for a loss occasioned by a peril not insured against, because occasioned by such negligence.

The second proposition of the plaintiff's counsel was, that the master, after a disaster, is to be considered as the agent of the insurers. This is believed to be contrary to all hitherto received opinions upon this subject. He is the agent of the owners until abandonment, or until legal cause for abandon-

ment, and in the latter case, even after such cause, unless the owners shall within reasonable time have elected to make such abandonment.

Any other doctrine would throw upon the insurer the whole responsibility fairly incumbent upon the insured; would annihilate his part of the contract, and expose the underwriters, not only to the perils of the seas, but to all the consequences of the frauds, carelessness, ignorance, unskilfulness and neglect of the insured and his servants; against which, by the nature of the contract, he stipulates to provide, and which he alone has the means of preventing.

It was argued by the plaintiff's counsel that the interest of the insurers requires that the master be considered their agent after a disaster; as otherwise he would be induced to make small repairs at great expense, and to their detriment. It is suggested in reply, that if he knew the actual extent of the injury, he must make only such repairs as are reasonably required. If he make more, the insurers will not be answerable for the excess; and in case of controversy, a jury must pass upon the propriety of his proceedings. If, on the other hand, the extent of the injury or its probable consequences be doubtful, it is better for the interest of all that they should be ascertained, at any expense short of a total loss; than that a further one of property, and it may be of life, should be hazarded.

No perfect rule, infallible for the protection of both parties, can be prescribed; but that which places the responsibility of honest discretion and reasonable care upon the insured and his agent, must be far less liable to abuse and to produce injury and injustice, than that which exonerates them from all responsibility whatever.

The last ground of exception is, to the ruling of the court, that if by the loss of the false keel the vessel became exposed to the action of the worms, which thereby obtained entrance and destroyed her, the loss by worms was a consequential injury, and so not within the policy. The legal maxim, "causa proxima, non remota, spectatur," is recognized by all writers upon this subject, and in many adjudged cases. Green v. Emslie, Peake 212; Kemp v. Vigne, 1 T. R. 304; Hahne v. Corbet, 2 Bing. 205; Livie v. Jansen, 12 East 648; Law v. Goddard, 12 Mass. 112.

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These cases are so analogous to that at bar, as to seem decisive of the question.

A cause cannot be said to be immediate, within the meaning of the law, where the consequence is not inevitable; but may be avoided by reasonable skill, care and diligence. To say, as is contended in this case, that the loss of the copper was the immediate cause of the destruction of the vessel, because the entrance of the worms is the inevitable consequence; is to beg the question.

It is true, that such was the inevitable consequence of the vessel's *remaining* in that condition; but not true, that it was the inevitable consequence of the injury.

The doctrine relied upon by the plaintiff, that a consequence is inevitable, where it must follow from the cause in the given conjuncture of circumstances, is too broad. For in that sense, all consequences from any cause are inevitable. And it would be just as true to say, that the destruction of a ship by fire was inevitable after it was communicated to her, though it might, by reasonable diligence, have been extinguished; or, that her sinking was the immediate consequence of a leak, which might by ordinary care have been stopped; as to say, that in this case, the destruction by worms was the inevitable consequence of the damage sustained at the Cape de Verds.

With regard to any claim for a partial loss, none was shown, amounting to the requisite average of five per cent; and had there been one, it was merged in the subsequent total loss. Rice v. Homer, 12 Mass. 230; Livie v. Johnson, 12 East 648.

Mr Webster stated, that he could add nothing to the full and able argument of Mr Loring; and that he submitted the case to the court upon that argument, without any observation upon it from him.

Mr Justice M'Lean delivered the opinion of the Court.

The plaintiffs brought an action of assumpsit, in the circuit court from the district of Massachusetts, on a policy of insurance, dated the 29th of December 1827; whereby the defendants caused to be assured Josiah Bradlee & Co. for Thomas Hazard, Jun. of New York, fifteen thousand dollars on the ship Dawn and outfits, at and from New York to the Pacific ocean

and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States.

The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo; and also a partial damage to the vessel by perils of the seas.

It appeared in evidence, that the vessel sailed the 29th of December 1827, and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December 1829, in a leaky condition; and upon an examination by competent surveyors, she was found to be so entirely perforated by worms in her keel, stem and stern post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold. The vessel had sustained an injury at the Cape de Verds, and she put into the port of St Salvador; at both of which places the bottom of the ship was examined by swimmers.

On the trial, a bill of exceptions was taken by the plaintiff's counsel, to certain instructions of the court to the jury, and the case is brought before this court by writ of error.

The first instruction excepted to, is as follows. "The court further charged, that in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms in the place where the insurance is asked for and made; unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes asking for the insurance; or unless the underwriter has some other knowledge, that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made."

This instruction refers to the letter written by the plaintiff, at New York, on the 22d of September 1827, to his agent in Boston, requesting him to have the ship Dawn insured, and in which letter he made the following statement respecting the

ship. "This is the same ship that you had insured for me in Boston some years since. I will only observe, that I believe her to be one of the strongest and best ships in the whale fishery; she has been newly coppered to light water mark, above which she is sheathed with leather to the wales, &c."

A representation to obtain an insurance, whether it be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of the underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty, as that always makes a part of the policy, and must be strictly and literally performed.

The rule prescribed by the circuit court, to govern the jury in giving a construction to the representation in this case, was founded upon the fact, supposed, admitted or proved, that what "is to be understood as a coppered ship at New York, would not be so considered at Boston." And this presents the point for consideration, whether the plaintiff, in making the representation, was bound by the usage of Boston, or of New York where his letter was written and his ship was moored.

It is insisted, that Boston is the place where the contract was made, and where effect was given to the representation; and that, consequently, not only the contract, but the inducements which led to it, must be controlled by the usages of Boston.

This is an important question in the law of insurance, and it seems not to have been settled by any adjudication in this country; and none has been cited from England. The plaintiff's counsel contends, that it is substantially a question of seaworthiness, and should be governed by the same rule; and he refers to a decision in 4 Mason 439, as decisive of the point. In that case an insurance was made in Boston, upon a British vessel belonging to the port of Halifax in Nova Scotia, and the court says, "if the Boston standard of seaworthiness should essentially differ from that in Halifax, in respect to equipments for a South American voyage of this sort, it would be pressing the argument very far to assert, that the vessel must rise to the Boston standard before the policy could attach. Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to the equip-

ments of vessels of that class for the voyage on which she is destined. He must be presumed to underwrite, upon the ground that the vessel will be seaworthy in her equipments, according to the general custom of the port, or at least, of the country to which she belongs."

In every policy there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured. The policy does not attach, unless the vessel be "properly manned and provided with all necessary stores, and in all respects fit for the intended voyage." The equipment of the vessel must depend upon the nature of the voyage; as a ship might be seaworthy for a voyage across the Atlantic, and not for a whaling voyage in the Pacific.

A representation might embrace all the facts of an implied warranty of seaworthiness; but this is wholly unnecessary, and is seldom, if ever done. The representation is designed to state the quality and condition of the ship, if that be the object of insurance, so as to induce the underwriters to insure on reasonable terms; and it is not limited to the facts necessary to constitute seaworthiness.

A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage. But the facts stated in a representation may go beyond those usages; and the insured is bound to the extent of his communication, whether verbal or written. In the one case, the law implies a definite and fixed responsibility; in the other, the liability depends upon the express declarations of the insured.

If the representation in this case fall below the implied warranty of seaworthiness, it does not, in any degree, affect such warranty; it cannot, therefore, be considered as a substitute for the implied seaworthiness of the ship, but as a representation which entered into the consideration of the underwriters, when they fixed the premium of insurance.

The question then recurs, was the plaintiff bound, in describing the ship, to use the appropriate terms according to the usage in Boston or in New York? It is said, the terms used were calculated to mislead the underwriters, as they resided at Boston; and in insuring a "coppered ship," would of course refer to a vessel which could be so appropriately called at Boston.

The writer of the letter is a resident of the city of New York; his letter was written at that place; and he described his vessel then in the harbour of that city. What terms would he be supposed to use in giving this description; those which are peculiar to New York, or those which are peculiar to Boston? Can he be presumed to know the usages of Boston in this respect; and must he not be presumed to know those of New York?

In making a representation respecting his vessel, his mind would not be directed to Boston, but to his ship then in the harbour of New York; and in describing her as a "coppered ship," he would refer to the appropriate designation at New York.

And would not the minds of the underwriters at Boston, seeing that the letter was written at New York, and represented a vessel in the harbour of that city, be very naturally directed to the sense in which the terms used were viewed in that place. Would they not inquire, whether the words "copered ship" mean the same thing at New York as at Boston.

In a case of seaworthiness, such is admitted to be the rule; and if the representation be not a warranty of seaworthiness, still does not the reason of the rule apply in the one case as forcibly as in the other.

The underwriters are presumed to know what constitutes seaworthiness in a foreign port, and to act under this knowledge; and why may they not, with equal propriety, be presumed to know, on a representation, the usage at the place where the vessel lies, and where she is described. It is but a presumed knowledge of usage in both cases; and which, in both cases, must have the same effect on the rights of the parties. If, therefore, the rule be applicable to a case of seaworthiness, it must be equally so to a case of representation.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political condition of foreign nations. Men who engage in this business, are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries. This knowledge is essentially connected with their ordinary business; and by

acting on the presumption that they possess it, no violence or injustice is done to their interests.

It would therefore seem to be reasonable to conclude that the defendants, when they made the insurance, were not misled by the representation of the plaintiff. That they must have considered the ship to be described according to the New York usage; such, at least, is the presumption which arises from the facts, and in strict analogy to other cases. The circuit court therefore erred in their instruction to the jury, that the representation was to be construed by the usage in Boston.

The second instruction of the court to which exception was taken is, "that although the terms of the letter applying for insurance were not to be considered a technical warranty, yet, if the coppering of the ship, as stated in the letter on which the insurance was made, was substantially untrue and incorrect in a point material to the risk, such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering."

Taking this instruction as disconnected with the first one, the principle asserted is undoubtedly correct. It is upon the representation that the underwriters are enabled to calculate the risk and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided. It is therefore immaterial in what way the loss may arise, where there has been such a misrepresentation as to make void the policy.

The fourth instruction excepted to will be next considered, as it embraces the principle asserted in the third. The judge charged, "that if the jury should find that in the Pacific ocean worms ordinarily assail and enter the bottom of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy."

This is an important question, and it seems now for the first time to be brought before this court.

In 1796 the case of Rhol v. Parr was tried, which involved this question, before Lord Kenyon, and a special jury, at nisi prius, reported in 1 Espinasse 445. His lordship said that "it appeared to him a question of fact rather than of law, such as the jury were competent to decide on, from the opinion on the

subject adopted by the underwriters and merchants." And "the jury found that it was not a loss within the term of 'perils of the sea' in policies of insurance, and of course that the plaintiff could not recover for a total loss."

There seems to have been a general acquiescence in this decision in England, as it has never been overruled.

In the case of Arnold Martin and others v. The Salem Marine Insurance Company, reported in 2 Mass. Rep. 420, the court expressly recognized the doctrine laid down in the case of Rhol v. Parr. But this doctrine is controverted in the case of Garrigues v. Coxe, 1 Binn. 596: and in Depeyster v. The Commercial Insurance Company, 2 Caines's Rep. 90, Mr Justice Livingston said that he did not "mean to be understood as subscribing to the nisi prius opinion of Lord Kenyon in the case of Rhol v. Parr; that it was not necessary to decide in the case whether a loss by worms was within the policy.

It was well remarked by Lord Kenyon, that whether a destruction by worms be within the policy was a question of fact rather than of law, and could be best ascertained by a jury from the opinion of underwriters and merchants. This was a nisi prius decision; but it gave such general satisfaction to both merchants and underwriters and all others concerned, as never to have been questioned in England. It was the establishment of a usage by the opinions of those most competent to judge of its reasonableness and propriety; and the approbation which has since been given to it in England by acquiescence, may well constitute it a rule in that country by which contracts of insurance are governed. And independent of the fact of its having been adopted by the supreme court of Massachusetts, is not the decision entitled to great consideration in this country? It comes from the same source from which the principles of our commercial law are derived, and to some extent, the forms of our commercial contracts. Would it not be reasonable to suppose that these contracts are entered into with a knowledge of the rule by which they are construed in the most commercial country, if our own courts had adopted no rule on the subject? But in the present case, the opinion of Lord Kenyon having been adopted in Massachusetts, the rule must certainly apply to all contracts made and to be executed in that state.

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The court, in their instruction, did not lay down the rule broadly, that a destruction by worms was not within the policy but the jury were told, that if, "in the Pacific ocean, worm ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms, would not be a loss within the policy." In other words, if the vessel was lost by an ordinary occurrence in the Pacific ocean, it was a loss against which the underwriters did not insure. In an enlarged sense, all losses which occur from maritime adventures, may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, &c. These are understood to be the "perils of the sea" referred to in the policy, and not those ordinary perils which every vessel must encounter.

If worms ordinarily perforate every vessel which sails in a certain sea; is not a risk of injury from them, as common to every vessel which sails on that sea, as the ordinary wear and decay of a vessel on other seas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar to the different seas; and which affect, in the same way, all vessels that enter into them? In one sea, the aggregation of marine substances which attach to the bottom of the vessel may possibly produce a loss; in another, a loss may be more likely to occur through the agency of worms. Can either of these losses be said to have been produced by extraordinary occurrences? Does not the cause of the injury exist in each sea, though in different degrees: and against which it is as necessary to guard, as to prevent the submersion of a ship, by having its seams well closed.

In the form in which the instruction under consideration was given, this court think there is no error. If it be desirable to be insured against this active agent which infests southern seas, it may be specially named in the policy.

The third instruction objected to is: "that if there was no misrepresentation in regard to the ship, and she substantially corresponded with the representation, still, if the injury which occurred at the Cape de Verds were reparable, and could have been repaired there, or at St Salvador, or at any other port at

which the vessel stopped in the course of the voyage; the master was bound to have caused such repairs to be made, if they were material to prevent any loss. And if he omitted to make such repairs, because he did not deem them necessary; and if, by such neglect, alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss so occasioned."

If the loss by worms is not within the policy, as has already been considered under the fourth instruction; it must at once be seen, that the court did not err in giving this instruction. The negligence or vigilance of the master could be of no importance, under the circumstances, in regard to the liability of the underwriters.

The other instructions in the case, relate to the loss of the vessel by worms, and the representation made by the plaintiff; and as they do not raise any distinct point, which has not already been substantially considered, it is unnecessary to enter into a special examination of them.

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings.

This cause came on to be heard on the transcript of the record from the circuit court of the United States, for the district of Massachusetts, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the said circuit court erred in instructing the jury, that in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms, in the place where the insurance is asked for and made, unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance; or, unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made; but there is no error in the other instructions given by the said circuit court. Whereupon, it is ordered and adjudged, that the judgment of the said circuit

court be, and the same is hereby reversed for this error; and that in all other respects the said judgment be, and the same is hereby affirmed. And it is further ordered by this court, that this cause be, and the same is hereby remanded to the said circuit court, with directions to award a venire facias de novo; and that further proceedings be had in said cause, according to right and jnstice, and in conformity to the opinion of this court.